SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 854

THE STATE OF OHIO on Relation of LOUIS MORREY GREENSTEIN,

Petitioner,

vs.

HONORABLE JOSEPH M. CLIFFORD, ET AL., as Judges of the Court of Common Pleas of Franklin County, Ohio,

Respondents

BRIEF IN SUPPORT OF PETITION

Summary of the Argument

The right to the payment of additional compensation at the end of 1942 must first be approved by the War Labor Board, now succeeded by the Wage Stabilization Board, before an employee can maintain an action against his employer to recover such a wage increase in a state court, because the federal Wage Stabilization Law is the paramount law of the land, requiring a state court to postpone its trial of such an action until said board has approved such a wage increase.

Emergency Price Control Act of 1942 as Amended, Section 5(a), Section 11;

Executive Order No. 9250, dated October 3, 1942, as amended by Executive Order No. 9381, dated September 25, 1943;

Executive Order No. 9672, dated December 31, 1945;

Treasury Decision 5295;

Wage Stabilization Board Rules (Title 29, C. F. R. Chapter VI, part 802;

1900 Corporation, being W. L. B. decisions 111-1138-D, dated November 27, 1943 (6 W. H. R. 1177);

Diamond Alkali Workers Union, etc. v. *The Buckeye Soda Company* (Not Reported), *infra.*

The necessary effect of the final judgment of the Supreme Court of Ohio is to deny the federal right of the petitioner under the federal Wage Stabilization Law and executive orders, issued thereunder since the recognition of this federal right requires a different judgment.

Chicago, Burlington & Quincy Railway Co. v. *People of the State of Illinois ex Rel.,* 200 U. S. 561, 580, 581;

Neilson v. *Lagow,* 12 Howard 98, 109, 111;

Opinion of the General Counsel of the W. L. B. dated August 18, 1944, War Labor Reports for November 1, 1944, page xxix *et seq.*);

Southern Railway Company v. *Railroad Commission,* 236 U. S. 439;

Northern Pacific Railway v. *North Dakota,* 250 U. S. 135;

International Association of Machinists v. *Watson, Attorney General of Florida,* 153 Florida 672;

International Brotherhood of Paper Makers v. *Wisconsin Employment Relations Board,* 245 Wisconsin 541.

The primary jurisdiction doctrine applies to the Wage Stabilization Board.

Armour & Co. v. *Alton R. R. Co.*, 312 U. S. 195;

Gen. Am. Tank Car Corp. v. *El Dorado Terminal Co.*, 308 U. S. 422;

Marony, et al. v. *Applegate, et al.*, 266 App. Div. 412, 42 N. Y. Supp. 2d 768;

United States Navigation Co. v. *Cunard Steamship Co.*, 284 U. S. 474;

Adler v. *Chicago & Southern Airline, Inc.*, 41 F. Supp. 366;

Thal has an adequate remedy before the Wage Stabilization Board;

1900 Corporation (W. L. B. Decision 111-1138-D, dated November 27, 1943, 6 Wage Hour Reporter 1177 for December 6, 1943).

ARGUMENT

The right to the payment of additional compensation at the end of 1942 must first be approved by the War Labor Board, now succeeded by the Wage Stabilization Board, before an employee can maintain an action against his employer to recover such a wage increase in a State Court, because the Federal Wage Stabilization Law is the paramount law of the land, requiring a state court to postpone its trial of such an action until said Board has approved such a wage increase.

Petitioner as a retail merchant in the City of Columbus, Ohio, employing more than eight persons at all times in question, is subject to the Act of Congress entitled "An Act to Amend the Emergency Price Control Act of 1942, to Aid in Preventing Inflation, and For Other Purposes". This Act was duly approved by the President of the United States on October 2, 1942. It is popularly known as the

Federal Wage Stabilization Law. Because of this Act petitioner was subject to the jurisdiction of the National War Labor Board and its several regional boards. Said Board has recently been succeeded by the Wage Stabilization Board which is operating with existing regulations as heretofore issued by the War Labor Board. (Executive Order 9672, December 31, 1945, F. R. 11, pg. 221, published January 4, 1946.) This new Board, as was the War Labor Board, is charged by said federal law and by Executive Order No. 9250 issued by the President on October 3, 1942, with the enforcement of the Federal Wage Stabilization Law, said Executive Order No. 9250, and its own regulations.

By virtue of said Executive Order No. 9250 (7 F. R. 7871, as amended by Executive Order No. 9381 September 25, 1943, 8 F. R. 13,083), it was provided among other things, in subdivision II—(1):

> "No increase in wage rates, granted as a result of voluntary agreement, collective bargaining, conciliation, arbitration or otherwise, and no decreases in wage rates, shall be authorized unless notice of such increases or decreases shall have been filed with the National War Labor Board and unless the National War Labor Board has approved such increases or decreases * * *.
>
> "III. * * * (2) The National War Labor Board shall constitute the agency of the Federal Government authorized to carry out the wage policies stated in this order, or the directives on policy issued by the director under this order. The National War Labor Board is further authorized to issue such rules and regulations as may be necessary for the speedy determination of the propriety of any wage increases or decreases in accordance with this order and to avail itself of the services and facilities of such state and federal departments and agencies as, in the discretion of the National War Labor Board, may be of assistance to the board.

"(3) *No provision with respect to wages contained in any labor agreemnt between employers and employees* (including the shipbuilding stabilization agreement as amended on May 16, 1942 and the wage stabilization agreement of the building construction industry arrived at May 22, 1942) *which is inconsistent with the policy herein enunciated or hereafter formulated by the director shall be enforced except with the approval of the National War Labor Board within the provisions of this order.* * * * (Emphasis supplied.)

"* * * VI. General Provisions. * * *

"(2) Salaries and wages under this order shall include all forms of direct or indirect remuneration to an employee or officer for work or personal services performed for an employer or corporation, including but not limited to bonuses, additional compensation, gifts, commissions, fees, and any other remuneration in any form or medium whatsoever (excluding insurance and pension benefits in a reasonable amount as determined by the director); *but for the purpose of determining wages or salaries for any period prior to September 16, 1942, such additional compensation shall be taken into account only in cases where it has been customarily paid by employers, to their employees.* 'Salaries' as used in this order mean remuneration for personal services regularly paid on a weekly, monthly, or annual basis * * *. (Emphasis supplied.)

"(5) The director may perform the functions and duties and exercise the powers, authority, and discretion conferred upon him by this order through such officials or agencies, and in such manner, as he may determine. *The decision of the director as to such delegation and the manner of exercise thereof shall be final.* (Emphasis supplied.)

(Signed) Franklin D. Roosevelt.

The White House
October 3, 1942."

Section 5 (a) of said Act to Amend the Emergency Price Control Act of 1942 provides:

> "(a) No employer shall pay, and no employee shall receive, wages or salaries in contravention of the regulations promulgated by the President under this Act. *The President shall also prescribe the extent to which any wage or salary payment made in contravention of such regulations shall be disregarded by the executive department and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation.*" (Emphasis supplied.)

In Section 11 of said Act of Congress the following is found:

> "Any individual, corporation, partnership or association willfully violating any provision of this Act, or any regulation promulgated thereunder, shall, upon conviction thereof, be subjected to a fine of not more than \$1,000.00 or to imprisonment of not more than one year, or to both said fine and imprisonment."

If the second cause of action in the amended petition in *Thal* v. *Greenstein* were tried by the Common Pleas Court and a verdict were returned in favor of Thal and against the instant petitioner, the latter would not be protected from the "double jeopardy" to which he would then be exposed by the improper exercise of jurisdiction by the Common Pleas Court in trying said second cause of action. The first jeopardy to which the petitioner would be exposed, if such a verdict were returned against him, arises from the jurisdiction of the Wage Stabilization Board to impose a fine and cause a criminal charge, resulting in a sentence of imprisonment, to be prosecuted against this petitioner for violation of the Federal Wage Stabilization Law and the Presidential Orders and the Wage Stabilization Director's decrees thereunder. Some of these have been quoted above.

The second jeopardy to which this petitioner would, under those circumstances, be exposed is the imposition of additional federal income and surtaxes by the Commissioner of Internal Revenue. The Commissioner may disallow any payment, being an increase in compensation to an employee, which had not been approved prior to payment by the Wage Stabilization Board, as a deduction in computing the net taxable income of the employer subject to the federal income and surtaxes. The petitioner, as an employer of Thal, can be penalized for making any payment of a wage increase to Thal without prior approval of the Wage Stabilization Board. The Commissioner can disallow not merely the increase, demanded by Thal if paid, but all compensation paid to Thal in 1942 if the Wage Stabilization Board does not approve the increase claimed by Thal. Such disallowance by the Commissioner can be made when he audits the income tax return of the petitioner and then determines whether any such payments of increased compensation to Thal, if made, have been approved first by the Wage Stabilization Board.

In other words, Thal received during 1942 a weekly wage of $75.00. He also received a $200.00 bonus at the end of 1941 and also 1942. He claims to be entitled to $3700 more for 1942, payable at the end of that year. These payments, if made, would aggregate $7800.00 for 1942 which are now being claimed by Thal as wages and additional compensation for 1942. If $7800 were paid by the petitioner, without prior approval of the $3700 payment by the Wage Stabilization Board, the entire $7800 could be disallowed as a deduction in arriving at the petitioner's net taxable income, as an employer, subject to federal income and surtaxes. If $7800 would be disallowed, to penalize the instant petitioner, by the Wage Stabilization Board as a deduction, resulting in an increase in income taxes, the Commissioner

of Internal Revenue can not decrease that penalty. Treasury Decision 5295. (1943 Cumulative Bulletin of Bureau of Internal Revenue 1193.)

The petition for a writ of prohibition alleges and the allegation is admitted by the demurrer of the instant respondents thereto, that Thal was paid as additional compensation only $200.00 in 1941 by the instant petitioner. Prior to that he was not employed by the petitioner. Hence, neither the petitioner nor Thal can properly claim that the latter was "customarily paid" $3900.00 at the end of each year, which Thal now claims was payable to him at the end of 1942. Executive Order No. 9250, as quoted above, provides that

> "for the purpose of determining wages or salaries for any period prior to September 16, 1942, such additional compensation shall be taken into account only in cases where it has been *customarily* paid by employers, to their employees." (Emphasis supplied.)

The purpose of the Wage Stabilization Law, which is officially known as the "Act to Amend the Emergency Price Control Act of 1942, to Aid in Preventing Inflation, and For Other Purposes" is, as this title implies, to keep wages from sky-rocketing. If there were an oral agreement, by which an employee was to receive an increase of $3700.00 a year for every year and he began his employment in 1941 and the agreement was made in March, 1942, as alleged, then at the end of 1942 he would have received $3700.00 more, if it were not for the Wage Stabilization Law; at the end of 1943, he would have received $7400.00 more than his starting wage; at the end of 1944, he would have received $11,100 more than his starting wage, etc. Thus, stabilization can not be effected if that type of contract, which is the type Thal here insists he has, is beyond the

reach or control of the Federal Wage Stabilization Law and the Wage Stabilization Board.

If the petition for a writ of prohibition is denied, employers and employees will be encouraged to connive together under such alleged contracts, which contract in the instant case is claimed to be oral, so as to pay to employees greatly increased wages which will really come out of the high surtax bracket payments, imposed by the United States Income Tax Law, if the Commissioner of Internal Revenue does not penalize the employer by disallowing the deduction for the increased compensation so paid.

The jurisdiction of the Wage Stabilization Board in this situation and over this form of alleged contract is clearly shown by its two rules which are found in Title 29, C. F. R. Chapter VI, Part 802, added by 7 F. R. 600 and revised by 8 F. R. 16, 712, as amended (also appearing in Volume IV, CCH 1945 edition, "Federal Administrative Procedure", at sections 802.54 and 802.57.) (See Appendix).

The Court will observe, under the last mentioned sections, that in this situation after a hearing and investigation by the Wage and Hour Office, there may not be a dispute case. This is pointed out in subdivision (iii) of (b)(2) of Section 802.54. In other words, where the Wage and Hour Division is satisfied "that no substantial question exists as to the party (employer) being a party" to the wage agreement, the Wage Stabilization Board goes ahead with the hearing under that particular rule of procedure rather than under the rule of procedure set forth in the Appendix relating to dispute cases. Thus, the Wage Stabilization Board may have jurisdiction over the wage increase claimed in the second cause of action in Thal's amended petition in the Common Pleas Court, either to approve it or disapprove it for the year 1942.

Approval by the Board must precede any action by Thal in the Common Pleas Court to recover the wage increase

under the regulations of the Wage Stabilization Board and Executive Order No. 9250.

The instant petitioner, if a judgment is entered against him in Thal's action by the Common Pleas Court, can be required to pay the judgment on execution. Such judgment and execution, however, will not protect the petitioner against a charge of a violation of the Wage Stabilization Law and the Executive Orders issued thereunder arising from the payment of a wage increase without prior approval of the Wage Stabilization Board. The petitioner for the payment of such a judgment and execution thus would be subject to fine, imprisonment and additional federal income and surtaxes. This is the "double jeopardy" to which reference above has been made.

The proceedings of the War Labor Board, the immediate predecessor of the Wage Stabilization Board, are filled with cases where unauthorized compensation increases were disallowed and where penalty fines were imposed for the payment of such increases.

Thal's employment by the petitioner began in 1941 and was terminated in January, 1943.

This court readily understands that if trial courts would have jurisdiction of such claims as that made by Thal, the Wage Stabilization Law could be nullified in large part. Actions could be instituted by employees against employers, willing to enter into such schemes, on alleged claims, as Thal is here claiming to have been made with instant petitioner, as his employer, prior to October 2, 1942. If the employer were willing to have the Wage Stabilization Law so easily by-passed, the employer could make a weak defense to his employee's action with the result that a judgment would be entered against the employer. The employee would get more compensation which the employer would always try to justify by saying that he had

been required to pay it by virtue of the judgment against him entered by the trial court of the state.

The exclusive jurisdiction, over the instant matter of the War Labor Board, is shown by the Board's decision in the 1900 Corporation, being Decision 111-1138-D, dated November 27, 1943, involving also the United Electrical Radio and Machine Workers of America, (CIO), St. Joseph, Michigan. This is reported in 6 Wage Hour Reporter 1177 for December 6, 1943.

The Union in this case protested the company's action, contending that failure to pay a customary bonus at the end of the year constituted a violation of Executive Order No. 9250 in that it constituted a decrease in wages not approved by the War Labor Board.

The Board has exclusive jurisdiction because the Wage Stabilization Law and the Executive Orders of the President of the United States thereunder are the paramount law of the land, superseding the law of Ohio or of any other state, which is subordinate thereto.

The Regional War Labor Board in the 1900 Corporation case ordered the company to pay the year-end compensation, but the National War Labor Board on appeal reversed the regional board. Thus, there was jurisdiction exercised over the same type of dispute in that case as we have here presented by Thal.

A similar attempt, to that being made by Thal to get a wage increase in the Common Pleas Court of Franklin County, Ohio, was made by the Diamond Alkali Workers Union, Local 12231, District 50, United Mine Workers of America in a suit against The Buckeye Soda Company (not reported) in the Court of Common Pleas of Lake County, Ohio, in which Judge Baker of that court on June 16, 1945 handed down an opinion declaring that his court had no jurisdiction whatever. No appeal from that decision was prosecuted.

The following is quoted from the conclusion of that opinion:

"*The court in this case rules that it is prohibited by law from ruling that the escalator clause can be enforced until such action has been approved by the National War Labor Board.* It makes such ruling for the following reasons:

"1. Congress expressly provided that no employer shall pay and no employee shall receive wages or salaries in contravention of the regulations promulgated by the President under the Stabilization Act of 1942.

"2. *The positive provision by Congress and the President that no increase in wages, even when the result of a Voluntary agreement, shall be authorized unless approved by the National War Labor Board.*

"3. A definite order that no provision with respect to wages contained in any labor agreement which is inconsistent with Executive Order Number 9250 shall be enforced except with the approval of the National War Labor Board.

"4. *The court has no authority to order the defendant to do something which is not only illegal but is punishable by fine or imprisonment.*

"5. Executive Order No. 9250 specifically states that wages shall include all forms of direct or indirect remuneration, including additional compensation and any other remuneration in any form or medium whatsoever. *Clearly, the granting of an increase in wages for work performed now, even though said increase was not to be payable until a later date, would be contrary to these provisions and illegal unless approved by the National War Labor Board.*

"This same method of getting around the Little Steel Formula was suggested by others to the National War Labor Board and the board rejected such plans. For instance, in American Cyanamid Chemical Corporation

v. United Mine Workers of America, Local 12059, District 50, the National War Labor Board Panel for the Third Region, on August 22, 1944, gave a directive order denying the Union's request that wages accruing under the automatic escalator clause shall be placed in escrow and paid to the workers on the termination of the war. A similar holding denying approval of a proposed deferred wage payment plan was made in the case of Milwaukee Electric Railway and Transport Company in the Sixth Region August 22, 1944.

"6. General Order Number 22 expressly provides that no escalator clause shall be enforced which would result in rates in excess of 15% above the rates prevailing on January 1, 1941.

"7. There is no authority in the state law for ordering such postponement of a money judgment. Although the court, in foreclosure cases, provides for a specified number of days in which payment of the judgment may be made before the property shall be sold to satisfy the judgment, nevertheless, the court knows of no law or cases where a court has held that the money judgment itself, once rendered, is not enforcible until some indefinite future date. The time of payment of a judgment is not discretionary with the court. If the employees are legally entitled to their money, they are entitled to it now." (Emphasis supplied.)

The necessary effect of the final judgment of the Supreme Court of Ohio is to deny the federal right of the petitioner under the Federal Wage Stabilization Law and Executive Orders, issued thereunder, since the recognition of this federal right requires a different judgment.

The Supreme Court of the State of Ohio under the guise of affirming the judgment of the Court of Appeals of Franklin County, Ohio, and declaring in its opinion

"General jurisdiction of the subject matter having been conferred by statute upon the Court of Common

> Pleas, a writ of prohibition should not issue denying that court the right to determine whether such jurisdiction attaches under the facts of a particular case",

decided issues over which the Wage Stabilization Board has exclusive, as well as primary jurisdiction by Act of Congress.

In *Chicago, Burlington & Quincy Railway Co.* v. *People of the State of Illinois ex Rel.*, 200 U. S. 561, 50 L. Ed. 596, 26 S. Ct. 341, the Court said:

> "* * * the general rule is that where the judgment of the state court rests upon an independent, separate ground of local or general law, broad enough or sufficient in itself to cover the essential issues and control the rights of the parties, however the Federal question raised on the record might be determined, this court will affirm or dismiss, as the one course or the other may be appropriate, without considering that question. But it is equally well settled that the failure of the state court to pass on the Federal right or immunity specially set up, of record, is not conclusive, but *this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law."* (Emphasis supplied.) See Particularly 200 U. S. pp. 580-581.

The Supreme Court of the State of Ohio in this case, has evaded the consideration of the Federal issue under the Federal Wage Stabilization Law and Executive Orders promulgated thereunder. The Supreme Court of the United States should consider the Federal issue involving the supremacy of the Act of Congress over the law of a State in accordance with the principles laid down in *Neilson* v. *Lagow,* 12 Howard 98, 109-111, 13 L. Ed. 909, 914, 915.

As was pointed out by the General Counsel of the War Labor Board in his opinion dated August 18, 1944 (War Labor Reports for November 1, 1944, page xxix, *et seq.*):

> "It is our opinion that, once the Board has properly acquired jurisdiction, the supremacy of the federal act suspends the operation of the state law with respect to disposition of the issues in dispute."

The foregoing opinion appears to be supported by *Southern Railway Company* v. *Railroad Commission,* 236 U. S. 439, from which the following is quoted:

> "The test * * * is not whether the state legislation is in conflict with the details of the federal law or supplements it but whether the state had any jurisdiction of a subject over which Congress has exerted its exclusive control * * * Congress has so far occupied the field of legislation relating to the equipment of freight cars with safety appliances as to supersede existing and prevent further legislation on the subject."

The foregoing rule is further supported by *Northern Pacific Railway* v. *North Dakota,* 250 U. S. 135, from which the following is quoted:

> "The elementary principle that under the Constitution the authority of the Government of the United States is paramount when exerted as to subjects concerning which it has the power to control is indisputable. This being true, it results that, although authority to regulate within a given sphere may exist in both the United States and in the states, when the former calls into play constitutional authority within such general sphere, the necessary effect of doing so is that, to the extent that any conflict arises, the state power is limited since in cases of conflict that which is paramount necessarily controls that which is subordinate."

In Pearson Candy Co. v. *Waits* (California Superior Court, 7 Labor Cases 61, 919 (1943)), the California Court

had been asked to adjudicate the validity of a contract entered into pursuant to an order of the War Labor Board. The California Court dismissed the suit. It held that for the duration of the war it considered state courts deprived of the authority to litigate matters over which the board had taken jurisdiction.

The same conclusion was reached by the Florida Supreme Court in *International Association of Machinists* v. *Watson, Attorney General of Florida,* 153 Fla. 672, 15 So. 2d 485, 13 LRR 433 (November 10, 1943). In that case the Florida Supreme Court overruled a contention by the State Attorney General that a closed shop agreement to which the Tampa Shipbuilding Company, a Florida corporation, was a party, violated the public policy of the state of Florida. The Attorney General had instituted a quo warranto proceeding in the state court to prevent the company from continuing to operate under the agreement. Directing that the proceeding be quashed, the Supreme Court of Florida said:

> "The National War Labor Board was created by Executive Order Jan. 12, 1942, for the purpose of procuring an uniterrupted prosecution of the war on the part of labor and industry. This Board was given the duty of disposing of all labor disputes which might affect the war effort. In consideration of labor agreeing to a policy of no strikes for the duration of the war, labor was given the right of collective bargaining, and the National War Labor Board was set up to settle all disputes peacefully. Now, if the executive department of each of the several states, through its attorney general, is allowed to question in the courts of the several states whether as a matter of public policy the war effort is being properly prosecuted, *then a clash is inevitable among state tribunals and between them and federal agencies expressly created for that purpose.*" (Emphasis supplied)

In *International Brotherhood of Paper Makers* v. *Wisconsin Employment Relations Board,* 245 Wis. 541, 15 N. W. 2d 806, 15 LRR 224 (1944), the Wisconsin Supreme Court on October 10, 1944, ordered that a question of reinstating a discharged employee and enforcing the other provisions of the state board's order remain in suspense

> "for the duration of the war or until such time as the order of the National War Labor Board ceases to be effective."

In explaining this disposition of the case, the Wisconsin Supreme Court stated that the War Labor Board's order

> "having been issued in the exercise of the war powers of the Executive in time of war supplants and operates to suspend state action in regard to the same subject matter."

Those opinions show that the writ of prohibition should be granted in the case at bar because there is no jurisdiction in the Common Pleas Court of Franklin County, Ohio, in the action of *Thal* v. *Greenstein* to decide whether the wage increase there claimed in the second cause of action should be approved or whether such an alleged oral agreement exists or what it means, if it does exist. That jurisdiction is vested solely and primarily in the Wage Stabilization Board by virtue of the Federal Wage Stabilization Law and the Executive Orders issued pursuant thereto which constitute the paramount law of the land.

The Primary Jurisdiction Doctrine Applies to the Wage Stabilization Board

The primary jurisdiction doctrine, heretofore applied to functions of the Interstate Commerce Commission in the field of railroad rates (*Armour & Co.* v. *Alton R. R. Co.,* 312 U. S. 195, 85 L. Ed. 771, 61 S. Ct. 598; *Gen. Am. Tank*

Car Corp. v. *El Dorado Terminal Co.*, 308 U. S. 422, 84 L. Ed. 361, 60 S. Ct. 325), and pipe line joint rate divisions, (*Marony et al.* v. *Applegate et al.*, 266 App. Div. 412, 42 N. Y. Supp. (2d) 768), the United States Shipping Board in the field of ocean rates (*United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U. S. 474, 76 L. Ed. 408, 52 S. Ct. 247), and the Civil Aeronautics Board in the field of airplane flight regulations (*Adler* v. *Chicago & Southern Airlines Inc.*, 41 F. Supp. 366), would seem equally applicable to the functions vested in the Wage Stabilization Board as the successor to the War Labor Board under the Federal Wage Stabilization Law and the Executive Orders issued thereunder.

Indeed, the doctrine seems especially applicable since by the Federal law and orders, the Board has been given very broad powers.

The judgment of the New York Court in *Marony et al.* v. *Applegate et al.*, 266 App. Div. 412, 42 N. Y. S. (2d) 768, shows that the writ of prohibition should be granted in this case as the bill was dismissed in that case until the Interstate Commerce Commission could first determine the primary question of what division of rates would be fair and reasonable. Here the Common Pleas Court should be prohibited from trying the second cause of action in *Thal* v. *Greenstein* until the Wage Stabilization Board first approves the wage increase demanded by Thal for 1942.

Thal Has an Adequate Remedy Before the Wage Stabilization Board

As we have mentioned above, the predecessor to the Wage Stabilization Board—that is, the War Labor Board—exercised jurisdiction in a comparable situation in the 1900 Corporation (Decision 111-1138-D, dated November 27,

1943, 6 Wage Hour Reporter 1177 for December 6, 1943). Thal complains that by the failure to pay $3700 by the end of 1942, his wage was illegally decreased. If so, he can and must invoke the exclusive jurisdiction of the Wage Stabilization Board over wages because the Federal Wage Stabilization Law says that wages may neither be increased nor decreased without the approval of the said Wage Stabilization Board.

If the Wage Stabilization Board approves the additional compensation demanded by Thal in his second cause of action of his amended petition, then he can sue the petitioner here in the Common Pleas Court in Ohio if the petitioner would still refuse to pay the then approved increase in compensation. The statute of limitations in Ohio is six years from the date of the alleged oral agreement and thus the remedy of an action in the state courts of Ohio will still be available to Thal if he secures the requisite prior approval of the Wage Stabilization Board for the additional compensation which he claims for the year, 1942.

The writ of certiorari should be granted.

Respectfully submitted,

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